No. 15121.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

MATSUO YOSHIDA and CHISATO YOSHIDA,
Appellants,

vs.

LIBERTY MUTUAL INSURANCE COMPANY, a corporation,
Appellee.

APPELLANTS' REPLY BRIEF.

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Discussion of the Evidence.

Throughout its Reply Brief, Appellee attempts to justify its conduct by stating that its employees made numerous mistakes in connection with the issuance and processing of claims on the insurance policy issued to Sylvester M. Gonzales. Appellee inconsistently asserts, however, that Appellants should pay the price of Appellee's mistakes.

In addition, Appellee lists in its Chronology of Events conclusions not made by the Trial Court and not warranted by the evidence. These are discussed as follows:

1. Right of Appellee to Approve Gonzales' Application.

Appellee states on page 3 of its Reply Brief that it had no opportunity "to review or approve" Gonzales' application for insurance.

Such statement is contrary to the evidence and contrary to the law governing the California Assigned Risk Plan.

The evidence clearly established that before Appellee issued its insurance policy to Gonzales, it received his application from the California Assigned Risk Plan and was afforded an opportunity to examine the application. [Tr. p. 3.]

Moreover, under California Administrative Code, Title 10, Chapter 5, Subchapter 3, Article 8, governing the California Automobile Assigned Risk Plan, it is provided in Section 2450 that the insurer designated by the manager of the plan is given three days after receipt of an application in which to accept or reject the applicant under the rules governing the plan.

In addition, Appellee's investigation report stated that Gonzales was "known to be driving car at present time even though his license has been suspended." [Pltf. Ex. 5, Tr. p. 120.]

Under such circumstances, Appellee was entitled to reject Gonzales' application under the Assigned Risk Plan. Section 2431.3a of the plan states as follows:

> "An applicant is not in good faith entitled to insurance if, upon the basis of investigation by the insurer to which the risk is assigned, it is determined to the satisfaction of the committee that the applicant has operated a motor vehicle during the period of revocation or suspension of his operator's license, on more than one occasion."

Thus, in spite of the opportunity to reject Gonzales' application, Appellee chose to accept his premium and issue its policy to him after examination and review of his application and receipt of an investigation report.

2. Gonzales' Insurance Policy.

On pages 6 and 7 of its Reply Brief, Appellee states that Gonzales was issued a policy on which the words "Named operator's policy 7921" appeared, and that said words mean to an insurance underwriter that instead of insuring Gonzales for the ownership of an automobile it was a restricted policy applying only while Gonzales was operating an automobile not owned by nor registered to him.

Regardless of what an insurance underwriter might interpret such words to mean, they have no significance and are not binding upon an insured.

It is clearly established in California that an insurance policy has the meaning a layman would give it and not as an attorney or insurance expert might interpret it.

Hobson v. Mutual Benefit Health & Accident Assn. (1950), 99 Cal. App. 2d 330, 221 P. 2d 761.

Thus, such words do not add to nor detract from the coverage afforded Gonzales.

3. Notice That Gonzales Purchased an Automobile.

Appellee states that Gonzales never gave notice to Appellee that he was the owner of the 1937 Chevrolet automobile and that only after the Yoshida accident, Appellee's investigation disclosed that said automobile was owned by Gonzales and registered to him. (Appellee's Reply Br., pp. 12, 14.)

That such is not true is established by the Findings of Fact prepared by Appellee wherein the Trial Court found that after the Lopez accident, and before the Yoshida accident, Gonzales gave Appellee notice that he was the owner of said 1937 Chevrolet. [Tr. p. 65.]

4. The Lopez Accident—Estoppel and Waiver.

Appellee argues that its conduct with respect to handling of the Lopez accident was caused by its errors and mistakes.

In its Reply Brief, on pages 20 and 21, Appellee quotes *Insurance Company v. Wolff* (1877), 95 U. S. 326, in support of the proposition that the doctrine of estoppel or waiver is not applicable in the instant case.

However, the *Wolff* case is solid authority for holding Appellee estopped to deny coverage in the instant case. The Supreme Court stated on page 333 that "the doctrine of estoppel or waiver can only be invoked where the conduct of the Company has been such as to wholly induce action and reliance upon it."

In this case, it is obvious that after the Lopez accident Gonzales relied upon Appellee's silence and assumed that he was covered by its insurance. (See Appellants' Op. Br. pp. 9-10, 23-26.)

Moreover, the Supreme Court stated on page 333 that "the doctrine of waiver and estoppel can be invoked only where it would operate as a fraud upon the assured if the insurer was afterward allowed to disallow its conduct and enforce the policy."

There could be no greater fraud upon Gonzales than to allow Appellee to disallow the contract at this late date and refuse to pay the judgment against its insured.

In addition, the portion quoted by Appellee states that before there can be a waiver or estoppel, the insurer should be appraised of all the facts. What more facts could Appellee have known than those received by it in connection with the Lopez accident which unequivocally appraised Appellee that Gonzales was the owner and operator of said 1937 Chevrolet automobile?

If ever the doctrine of estoppel or waiver is applicable it must be applied in the instant case.

Finally, Appellee urges that Gonzales cannot be assumed to have driven his car subsequent to the Lopez accident in view of his filing of a Certificate of Non-operation with the California Department of Motor Vehicles. The certificate stated that Gonzales did not operate the 1937 Chevrolet automobile between December 31, 1952, and June 25, 1953, and that during said period of time the automobile was in storage. [Deft. Ex. E, Tr. p. 301.]

However, Appellee omitted from its brief the fact that Gonzales testified that he drove the automobile during said period of time and that his automobile was not in storage; that he did not file a certificate with the Department of Motor Vehicles stating that said Chevrolet had not been driven during said period because of mechanical conditions [Tr. pp. 227-229]; that he could not read; that the certificate was filled in by an employee of the license bureau in Los Angeles; and that he never told said employee that his automobile was not in running condition from December 31, 1952, until the date of the certificate. [Tr. pp. 242, 244.]

Although Appellee urges that Gonzales can read, the Findings of Fact prepared by Appellee and signed by the Trial Court made no mention of Gonzales' literacy and the direct testimony of Gonzales, Mrs. Gonzales and Appellee's insurance adjuster unequivocally establishes that Gonzales could not read the certificate which he signed. [Tr. pp. 181, 392.] Thus, this argument must also fall.

ARGUMENT.

I.

Gonzales' 1937 Chevrolet Was Not an "Owned" Vehicle Within the Meaning of the Exclusion of Appellee's Insurance Policy.

Subsequent to the time that Appellants filed their Opening Brief, the California District Court of Appeal handed down its opinion in *Oil Base, Inc. v. Transport Indemnity Company* (1956), 143 A. C. A. 509, ... P. 2d .....

In the *Oil Base* case, *supra,* the policy covered the insured for liability arising out of accident excluding "with respect to any hired automobile, the owner thereof, or any employee of such owner."

Under the policy, the term "owned automobile" was defined as an automobile owned by the named insured. The term "hired automobile" was defined as one used under contract by or loan to the named insured and which is not owned or registered in its name.

The insured hired a vehicle from a party which had leased it from the owner. The question was whether the letter of the vehicle was covered or whether the letter was not protected under the policy because of the exclusion against "the owner of the hired vehicle."

The Court stated on pages 518-519 as follows:

> "The word owner as applied to motor vehicles is commonly understood to designate the person in whom title is vested either as a legal owner or as a registered owner . . . no contention was made by counsel for any of the parties at the trial of this action that the word owner as used in the clause of the contract in question has any other meaning."

The Trial Court found that the letter was an "owner" of the vehicle and excluded under the policy under California Civil Code, Section 694, which defines ownership as the right to possess and use a thing to the exclusion of others. The Court of Appeal reversed.

The Court set forth the general proposition of California law on page 519 that:

> "Exceptions in a contract of insurance are to be construed 'most strongly against the insurer and in favor of the insured and if susceptible to two meanings, the one most favorable to the insured is to be adopted.' "

The Court further stated on page 519 that:

> "The word 'owner' is certainly susceptible of meaning the legal or registered owner, and if we assume that it is also susceptible of meaning a person in possession under a lease, still the meaning that will grant coverage should be adopted. If it had been the intention of the insurer to except the letter of a hired vehicle who was not an owner from the coverage granted by the omnibus clause, it would have been a simple matter to have made the exception clear by the addition of the word 'letter' to that clause as to make it read, 'with respect to any hired automobile, to the owner or letter thereof, or any employee of such owner or letter.' "

In the instant case, the findings of the Trial Court are not based upon any conflict in the evidence but are the legal conclusions or conclusions of fact arrived at in the interpretation of the insurance policy issued by Appellee to Gonzales. Therefore, any errors are those of law and

not of fact, and the findings are not binding upon the Court of Appeals.

Oil Base, Inc. v. Transport Indemnity Company (1956), 143 A. C. A. 509, 517, ... P. 2d .....;

Estate of Platt (1942), 21 Cal. 2d 343, 352, 131 P. 2d 825;

Continental Casualty Company v. Phoenix Construction Company (1956), 46 A. C. 429, 435, 296 P. 2d 801.

The *Oil Base* case enunciates California law relevant to the instant action as follows:

1. The Appellate Court is not bound by the Trial Court's interpretation of an insurance policy.
2. An exclusion in an insurance policy is to be construed most strongly in favor of granting coverage.
3. The term "owner" appearing in an insurance policy is susceptible of more than one meaning. The meaning in favor of granting coverage is to be adopted by the Court.

Accordingly, in the instant case:

1. The exclusion in Appellee's insurance policy must be construed most strongly against Appellee.
2. The exclusion against owned automobiles is subject to more than one construction. Thus, the term must be construed against Appellee and in favor of extending coverage. Accordingly, in the instant case, since "title of ownership" did not pass to Gonzales until he paid the full purchase price, the Court must hold that Gonzales was not the owner within the meaning of the exclusion. This was the

construction given by Appellee in its processing of both the Lopez and Yoshida claims. (See Appellant's Op. Br. pp. 9-10.)

Thus, Gonzales was covered under the provisions of Appellee's insurance policy.

Conclusion.

The Court of Appeals should, therefore, enter judgment in favor of Appellants.

Respectfully submitted,

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Attorney for Appellants.